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Supreme Court, U.S.
FILED

06-544 SEP 18 2006

NO.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CALVIN DAVID FOX,

Petitioner,

vs.

PRUDENTIAL FINANCIAL, d.b.a, Prudential Securities, Inc., f.k.a, Prudential Insurance and THE NEW YORK STOCK EXCHANGE,

Respondents.

ON PETITION FOR CERTIORARI TO THE
U.S. ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

CALVIN DAVID FOX
Post Office Box 7900
Jupiter,Florida 33468
(954) 383-5943

STATEMENT OF ISSUES

1.) Under Title 28, Section 455(a), is the impartiality of a trial judge reasonably questioned and the trial judge should be disqualified, where instead of granting repeated motions for default, the trial judge vacates the Clerk's default; and then contacts a giant global Defendant and its national law firm, in order to and allows the Defendant twenty (20) additional days to appear and defend this cause against an individual **pro se** whistleblower Plaintiff?

2.) Under **Liljeberg v. Health Services Corp**, 486 U.S. 847, at 860 and 865 (1988); **Offut v. United States**, 348 U.S. 1, at 14 (1954); and **Liteky v. United States**, 510 U.S. 540, at 555 (1994) is the impartiality of a trial judge reasonably questioned, where instead of granting repeated motions for default, the judge vacates the Clerk's default; and then contacts a giant law firm and a global Defendant in order to allow the Defendant twenty (20) additional days, to appear and defend this cause against an individual **pro se** whistleblower Plaintiff?

CORPORATE DISCLOSURE

Pursuant to Rule 29.6 the Petitioner hereby files this Corporate Disclosure Statement:

Prudential Financial;

Prudential Insurance;

Pruco;

Prudential Securities, Inc.; and

The New York Stock Exchange, Inc.

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The opinion of the United States Eleventh Circuit Court of Appeals, dated April 27, 2006, is contained in the Appendix at A1-A18. and will be reported and widely cited in West's electronic case reporting system, as **Fox v. Prudential**, __ West Law ___ (11th Cir. April 27, 2006).

JURISDICTION

On June 20, 2006 the U.S. Eleventh Circuit denied rehearing and rehearing en banc. A19-A20. The Petitioner invokes the Court's jurisdiction under Title 28 United States Code Section 1254.

This Court has direct conflict jurisdiction herein under this Court's decisions in **Liljeberg v. Health Services Corp.**, 486 U.S. 847, at 860, and 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); **Offut v. United States**, 348 U.S. 1, at 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954); **Liteky v. United States**, 510 U.S. 540, at 555, 114 S.Ct. 1147, at 1157, 127 L.Ed.2d 474 (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the United States Constitution provides that:

"No person shall . . . be deprived of life, liberty, or property, without due process of law;"

Title 28, Section 455(a) United States Code provides that:

> "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

I.

STATEMENT OF THE PROCEEDINGS

A. THE PRESENT PETITION

This Petition is predicated upon the **reasonable** conclusion, based upon evidence and conduct, that the trial judge has engaged in improper contact with Prudential and its national law firm and is partial to Prudential and its law firm.

1.) Trial Court Contacts and"Serves" Defendant Again, Rather than Enter a Default.

The Plaintiff [Fox] caused service of process to be made upon the Defendant [Prudential] on **November 17, 2004**. A51-A53. The State of Florida **confirmed** its acceptance of service of process on November 17, 2004. A54-A55. On **December 17, 2004** Fox moved for a default. A69-A71.

On **February 3, 2005**, seventy-eight (78) days after Prudential had been served, the Clerk of the Court entered a default against Prudential. A72. On

February 14, 2005, eighty-nine (89) days after Prudential had been served, the trial court again refused to enter a default against Prudential. A80-A83. Instead, the trial court **sua sponte** vacated the Clerk's Default. A84-A85.

2.) Allegations of Impropriety not Denied Nor Explained by Prudential nor Trial Court

None of the foregoing reasonable conclusions and allegations has been denied nor explained by Prudential, its attorneys or the trial court.

Instead of granting a default, the trial court and/or its clerks, apparently determined who wanted to represent Prudential. **Cf.**, A83. Thereupon they contacted a national law firm and sent them pleadings in this cause, which allowed the giant law firm to appear for Prudential. **See**, A83, at entry, "**Copies provided to: Prudential**." Furthermore, in order to assist Prudential in its defense in this cause the Court allowed Prudential an additional twenty (20) days to defend this matter. A83.

B. THE COMPLAINT AND FIRST DISMISSAL

On **February 4, 2003**, Fox filed his complaint for relief under Title 31 U.S. Code Sections 3729 et seq. the False Claims Relief Act against Prudential for Prudential's money laundering activities of which Fox had personal knowledge. See, A29-A50. On March 21, 2003, Fox filed a first Amended Complaint, against

PRUDENTIAL, which just added The New York Stock Exchange as a named defendant. Id. Under Title 31 U.S. Code Section 3720(b)(2), this cause was sealed until the Government investigated.

After an endless series of errors committed by the magistrate, the trial court dismissed both parts of Fox's complaint, before service of process.

C. THE FIRST APPELLATE REVERSAL

On **April 19, 2004** the 11th Circuit Court's first panel issued its opinion reversing the **patently erroneous** order by the trial court in dismissing Fox's retaliation and employment claim [the "second claim"]. **See**, A21-A28. The panel affirmed the dismissal without prejudice of the **first part** of Fox's complaint relating the admission of money laundering by Prudential and assistance by the New York Stock Exchange. **Id. However**, the first panel noted that Fox could indeed make a sufficient claim against Prudential on the first part of the complaint under **United States v. Pemco Aeroplex**, 195 F.3d 1234, at 1237-1238 (11th Cir. 1999)(**en banc**) by making only one additional allegation. **Calvin David Fox v. Prudential**, 11th Cir. Case 03-16357 (April 19, 2004)(Slip Opinion at A27).

D.) REMAND AFTER FIRST PANEL REVERSAL

1.) Motion to Amend Granted Erroneously

On **November 30, 2004**, the Magistrate had granted Fox's Motion to Amend (A56-A59) his complaint. A60-A63. However, without explanation or discussion the Magistrate in the last sentence of her order confined the amendment to only the "retaliation" complaint under 31 U.S.C. Section 3730(h)[the "second claim"]. A62. This was **not** what the Plaintiff's Motion to Amend plainly sought. **See**, A56-A60.

2.) The Magistrate Rejects Motion for Default

Meanwhile, on **December 17, 2004** Fox moved for a default against Prudential and noted the affidavit of service of process and the acceptance of process by the State. A69-A71. (affadivit of service of process). However, on December 22, 2004 the Magistrate recommended that a default not be entered, because she had entered the foregoing erroneous order allowing Fox to amend his retaliation complaint under Section 3730(h), "in accordance with the Eleventh Circuit opinon." A64-A68.

Consistent with **chronic** errors throughout this cause with respect to service of documents upon Fox, the Magistrates Order was not served upon Fox, until nine (9) days after it was filed. **See**, A73-A79. As a consequence of the late service, Fox filed Objections to the Magistrate's Report, and a Motion for Rehearing of any Order, which sustained the Magistrate's Report, pointing out a.) that Fox **never** asked to amend his "retaliation" complaint; b.) that the 11th Circuit Court in its opinion did not require any amendment of the "retaliation" complaint as suggested by the Magistrate; and that Magistrate's Order using the erroneous order allowing amendment, as the reason for denying the default was **utterly** erroneous in fact and law. A73-A79.

3.) The Clerk of Court Correctly Enters a Default

As noted, on **February 3, 2003**, seventy-eight (78) days after Prudential was served with the First Amended Complaint, the Clerk of the U.S. District Court for the Southern District of Florida entered a default against Prudential. A72.

4.) Trial Court Denies Motions for Default and Rehearing and Defends Prudential

On January 14, 2005, while Fox's Objections were in transit, the trial court issued its order accepting the Magistrates Report but, the trial court's order was not served upon Fox until **January 21, 2005**, eight (8) days after it was filed. See, A73-A79. While the January 14th order was in transit, Fox filed his pleading, renewing his Motion for Default and restating that he had not asked nor did he want to amend his retaliation claim. **Id.**

On **February 14, 2005**, eighty-nine (89) days after Prudential was served with the complaint, the trial again refused to enter a default. A80-A83. Instead, the Court denied Fox's Renewed Motion for Default and Motion for Rehearing and vacated the Magistrate's order, which had mistakenly allowed Fox to amend only his Section 3730(h) complaint. **Id.**, A84-A85.

As noted, relevant to this petition, and assisting Prudential in its defense of this cause and avoiding a default against Prudential, the Court and/or its-staff **sua sponte,** determined who wanted to represent Prudential; contacted Prudential, probably through its law firm and allow them twenty (20) more days to appear and to defend this cause. **Id**.. The reasonable record evidence, of **ex parte** communication by the Court is in the subsequent **sua sponte** entry upon the Court's order:

> "**Copies provided to:... Prudential**". [Emphasis added].
>
> A83.

At this point in the proceedings, Prudential and its lawyers had made no appearance in this cause. What service the court provided and how it determined to contact and send Prudential and its lawyers notice of these proceedings has never been disclosed and has never been denied.

The Court's apparent **ex parte** contact with counsel and Prudential has never been denied nor the substance disclosed by the Court nor the Defendant and its counsel, in the face of Fox's obvious distress at this **bizarre** turn of events. **E.g.**, A96, para. 10; A110-A112. Furthermore, the Court's and its staff's relationship with the law firm, which appeared and attorneys Ianno; Brown and Cortvriend, has not been disclosed nor denied and neither has the contact or content of the discussion with Prudential and its lawyers been disclosed.

As noted, on February 15, 2005, the Court **sua sponte** vacated the Clerk's Default. A84-A85. On February 25, Fox Amended his previously filed Motions for Default. A86-A89. Fox in the Motion for Default, complains to the Court that the Court has vacated the putative impediment to the default and therefore there was no lawful reason a default should not be entered against Prudential. **Id.** Furthermore, Fox complained that the Court had compromised the appearance of impartiality, by aiding Prudential to defend this cause:

> "That this Court should not compromise its impartiality by insert[ing] itself into the defense of Prudential Financial by **sua sponte** causing yet additional notice to Prudential that it should defend this cause." A88.

In response to Fox's Amended Motion for Default and suggestion that the Court had compromised its impartiality by aiding Prudential to defend this cause, on March 1, 2005 the Court threatened the Plaintiff with Rule 11 sanctions and noted that the time for Prudential to respond had not yet expired under the Court's **sua sponte** order, allowing Prudential more time to respond. A90-A91.

On March 4, 2005 Fox moved to rehear and vacate said Order which allowed Prudential twenty more days after the Court contacted its lawyers, to defend; and Order DE44, which struck the Clerk's Default. A93-A98. In this pleading, Fox bitterly complained that the Court should not compromise its impartiality by **sua sponte** aiding Prudential in its defense of this cause, where there was no lawful basis to deny a default; and by contacting Prudential **ex parte** to aid Prudential in defending this cause. **Id.**. In response on **March 11, 2005** the Court again threatened the Plaintiff with Rule 11 sanctions if the Plaintiff made either argument again, but did **not** deny any **ex parte** contact. A99-A101.

E. THE SECOND PANEL DECISION REVERSING UPON THE SAME GROUNDS

On appeal from the order denying disqualification, the second panel decision again reversed the trial court upon the same issue as the first panel decision, citing the, "law of the case." A14-A18. **However**, the panel did not address the Plaintiff's right to amend the first count of his complaint as allowed by the first panel decision, but disallowed by the repeated errors of the magistrate, which the trial court did not disturb.

Relevant to this petition, the second panel declined to order the trial court to be disqualified. A12-A14. However, the panel greatly overlooked the foregoing record facts and procedural history of this cause. **See**, A3-A14. Instead the second panel concluded that Fox was imagining the misconduct and there was no "reasonable" basis as required by Title 28 Section 455(a) to disqualify the trial court. **See** A12-A14.

REASONS TO GRANT THE WRIT

The Petitioner is now in severely ill health. Already the trial judge has been reversed **twice** upon the same grounds. Futile litigation for additional years, in the face of the grounds raised in this petition, are not be possible. As reflected upon the face of the record, the appearance of impartiality of the trial court has been severely compromised. A reasonable person would conclude that any further proceedings before this trial court against Prudential and its national law firm are futile, no matter what the merit of the cause.

The Courts below treated the Plaintiff's Motion to Disqualify as a motion for recusal under Title 28 Section 455(a). Section 455(a) provides that:

> "Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might **reasonably** be questioned." [Emphasis added].

In **Liljeberg v. Health Services Corp.**, 486 U.S. 847, 860, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), the Court explained that the intent of Section 455(a) is:

> "[T]o promote public confidence in the integrity of the judicial process" and "to promote confidence in the judiciary by avoiding **even** the appearance of impropriety. . ."[Emphasis added].

Accord, **Parker v. Connors Steel Co.**, 855 F.2d 1510, at 1523 (11th Cir. 1988).

Therefore, in the face of the intent of Section 455(a) other Courts have held that disqualification should be granted if there is any doubt as to whether disqualification is appropriate. **E.g.**, **Parker v. Connors Steel**, 855 F.2d at 1254. Thus, inherent in the requirements of Section 455(a) is that "our system of justice must satisfy the **appearance** of justice." [emphasis added], **Parker**, quoting **Offut v. United States**, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954); **see, also, Aetna Life Insurance v. Lavoie**, 475 U.S. 813, at 825, 106 S.Ct. 1580, at 1587, 89 L.Ed.2d 823 (1986); **In Re Murchison**, 349 U.S. 133, at 136, 75 S.Ct. 623, at 625, 99 L.Ed. 942 (1955).

Scienter of wrongdoing of the judge is **not** required to find a reason for disqualification under Section 455(a). **Parker**, 855 F.2d at 1523, **citing**, **Liljeberg v. Health Services Corp, supra**; In **Liljeberg v. Health Services**, the Court noted that the importance of the **appearance** of impartiality cannot be gainsaid, in that the lack of the appearance that justice is being done, rises to the level of a **denial of due process**. 486 U.S. at 865 n. 12, 108 S.Ct.at 2205, n.12. Where a judge, instead of representing the impersonal authority of law, becomes personally embroiled with a party, he should disqualify himself. **Offut v. United States**, 348 U.S. at 17, 75 S.Ct. at 15; **Jones v. Luebbers**, 359 F.3d 1005, at 1014 (8th Cir. 2004).

Finally, a judge may be disqualified by events during a proceeding **in combination** with so-called extrajudicial matters. **Liteky v. United States**, 510 U.S. 540, at 555, 114 S.Ct. 1147, at 1157, 127 L.Ed.2d 474 (1994). In **Liteky** the court explained the rule thus:

> "[J]udicial rulings alone **almost** never constitute a valid basis for a bias or partiality motion. . . . events occurring in the course of proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion **unless** they display a deep-seated **favoritism** or antagonism that would make fair judgment impossible." [Emphasis added].

Id., at 114 S.Ct. 1157.

In the present case, the Court refusing to enter a default and then becoming personally involved in soliciting Prudential and its attorneys to defend this case and the undisputed evidence of off-the-record **ex parte** contact with Prudential, which neither Prudential and its lawyer, nor the trial judge have ever denied, is an anathema to any sense of confidence by a **reasonable** person in the judicial system. Secret discussions with a massive, national law firm representing a massive, global corporation against a lone **pro se** litigant, **manifestly** deflate any confidence by a **reasonable** person in the judiciary and that the trial court is impartial.

Moreover, the repeated refusal and threat of sanctions against the Plaintiff combined with the absence of any reasonable or lawful basis to deny a default against Prudential and its attorneys, in combination with the **obvious** off-the-record assistance to and contact with Prudential and its attorneys; and the **obvious** failure to offer any explanation for the Court's non-record contact with Prudential and its attorneys; and the Court's failure to offer any explanation for its relationship with Prudential and its attorneys, together cause the greatest lack of confidence in the integrity of the judiciary and a gross lack of the "appearance of justice" in this cause, and a **reasonable** belief that this matter has not been and will not be fairly considered. There was just not the appearance of justice in this cause. Instead, the appearance was off-the-record favor to a massive, politically connected law firm and its global client. The foregoing circumstances and facts manifest a **reasonable** conclusion that this matter is controlled by the **favoritism** of the Court and its Magistrate on the record and off the record for Prudential and its attorneys as against a **pro se** whistleblower litigant.

The foregoing concerns and need for impartiality is particularly important in the case at bar, where the trial judge is also the trier of fact. **See**, **Alexander v. Primerica Holdings**, 10 F.3d 155, at 166 (3d Cir. 1993). **Sub judice**, under the foregoing authority, **Parker v. Connors Steel**, **Liljeberg v. Health Services;** and **Liteky v. United States** and their progeny, this Court should accept jurisdiction herein and require that this cause be reassigned to another division of the U.S. District Court for the Southern District of Florida and all proceedings and rulings by the present trial judge be set aside.

Furthermore, in this particular case, the record proceedings also support a **reasonable** conclusion that the Court is not impartial. Never in thirty (30) years of state and federal litigation, has the magnitude of **chronic**, foolish errors been committed by the Magistrate, and the chronic errors of service of documents, which have been completely ignored by the trial court and twice summarily reversed by the appellate court. The **irascible** failure of the Court to allow a legitmately amended complaint as allowed by the appellate court, together with threats to impose Rule 11 sanctions, where Fox sought to correctly amend his entire compliant; and the Court's apparent puzzlement as to why Fox did not filed an amended complaint (A150-A151 "Order Closing Case), should be subject to serious inquiry.

FUNDAMENTAL DUE PROCESS.

That the right to due process is fundamental to our system of justice and the Bill of Rights cannot be gainsaid. **E.g.**, **Baldwin v. Hale**, 68 U.S. (1 Wall.) 223, at 233, 17 L.Ed. 531 (1864); **Hagar v. Reclamation District**, 111U.S.701,708 (1884).

There was obviously no fundamental due process in the present case if this cause is measured by any standards, which are applicable to other citizens. The proceedings below were predicated upon the ***ex parte*** contact between the Court and Prudential and its law firm. Due process requires that the trier of fact be impartial and that the Plaintiff have his day in court, neither of which have been allowed here.

CONCLUSION

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Petitioner, CALVIN DAVID FOX, prays that this Petition for Certiorari jurisdiction be granted and that this Court will review this cause upon the merits.

CALVIN DAVID FOX
Post Office Box 7900
Jupiter, Florida 33468
(954) 383-5943

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-14665
Non-Argument Calendar

D.C. Docket No. 03-80081-CV-KLR

CALVIN DAVID FOX,

Plaintiff-Appellant,

versus

PRUDENTIAL FINANCIAL,
d.b.a. Prudential Securities, Inc.,
a.k.a. Prudential Insurance,
NEW YORK STOCK EXCHANGE,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Florida

(April 27, 2006)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Calvin David Fox appeals pro se[1] the district court's order dismissing without prejudice his complaint against Prudential Financial (Prudential) and the New York Stock Exchange (NYSE) alleging retaliation for engaging in acts to further a claim under the False Claims Act (FCA), 31 U.S.C. § 3730(h). The district court denied several of Fox's motions and dismissed his complaint under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim. Fox contends that the district court abused its discretion in denying his motions: (1) for a default judgment, (2) to amend his complaint (3) and to disqualify the judge.

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[1] Fox was an attorney licensed to practice in Florida until his license was suspended by order of the Florida Supreme Court in November, 1999. Fox falsely claimed to Prudential, his employer at the time, that his license suspension was stayed pending a motion for rehearing, and Fox submitted to Prudential a fraudulently altered Florida Supreme Court Order to support his bogus claim. Prudential states that it fired Fox for that reason.

In addition, Fox contends that the district court improperly dismissed his complaint under Rule 12(b)(6).

The factual allegations and procedural history in this case are long and complicated, with this Court having issued an opinion in the case once before. For present purposes, the relevant facts follow. Fox initially brought several claims against Prudential and the NYSE under the FCA, all of which were dismissed by the district court on the magistrate judge's recommendation. Fox appealed, and on April 19, 2004 this Court remanded the case to the district court for consideration of Fox's whistleblower claim, holding that he "arguably stated" a claim under the whistleblower provision of the FCA. On remand, on October 29, 2004, the district court ordered the parties to show cause why the action should not be dismissed and judgment entered. Fox responded on November 12, 2004 by filing a motion for leave to amend and serve an amended complaint. The magistrate judge granted Fox's motion to amend his complaint on November 30, 2004, but Fox failed to do so.

Instead, on December 17, 2004, he moved for default judgment against Prudential because Prudential failed to respond to the complaint he had allegedly served on November 17, 2004. The district court denied Fox's motion explaining that because he sought and received permission to file a second amended complaint on November 30, 2004; he could not seek a default for failure to file a response to a first amended complaint served before that date. The district court noted the inherent contradictions in Fox's position: he sought and was granted leave to file a second amended complaint, but he wanted to penalize Prudential for failing to respond to his first amended complaint.

Fox filed a second; and then a third motion for default. The clerk of the court granted the third motion on February 3, 2005, but the district court struck that order on February 15, 2005. On February 14, 2005, because of Fox's failure to file a second amended complaint, the district court vacated the order granting Fox's motion to amend and directed Prudential to respond to the first amended complaint within 20 days.

On February 25, 2005, apparently hoping the fourth time would be the charm, Fox filed a renewed motion for default. Not chamred in the least, the district court denied the motion pointing out that Fox's fourth motion made the same arguments as his previous three motions had. The court stated that Prudential had 20 days from its February 14, 2005 order to respond to Fox's amended complaint, and the 20 days had not yet elapsed.

On March 3, 2005, Prudential did respond, and filed a motion to dismiss on two grounds: (1) failure of service of process and (2) failing to state a claim. Regarding the failure to state a claim, Prudential noted that Fox did not allege that he was engaged in an activity that had a "distinct possibility" of leading to an FCA action or that Prudential had knowledge of the activity, as required under the FCA whistleblower provision.

Undeterred by the court's previous warnings, Fox responded with a motion to rehear and vacate the previous court orders denying his motion for default and with a second amended renewed motion for default. For the fifth time, Fox made the same arguments about default to the district court. In the same motion, he also alleged that the court breached its duty of impartiality by having ex parte communications and "secret discussions" with Prudential. The court denied these motions and explained to Fox that his identical successive motions were a tax on court resources and that he would be sanctioned if he filed another such motion.

Fox finally responded to Prudential's reply, and the magistrate judge recommended that the district court dismiss Fox's complaint without prejudice for failure to state a claim on May 11, 2005. Fox objected to the magistrate's report on May 31, 2005, and he moved again to disqualify the court. The district court adopted the magistrate's report and recommendation and dismissed the case under Rule 12(b)(6) without prejudice on June 3, 2005. Fox filed a renewed motion to amend his complaint on June 13, 2005. The court denied Fox's motion to amend his complaint because Fox "caused a needless waste of this Court's resources," and it denied Fox's motion to disqualify the court because no reasonable person familiar with the facts of the case would doubt the court's impartiality.

I.

We review for abuse of discretion the district court's denial of motions for (1) default judgment, (2) to amend a complaint, and (3) to disqualify a judge. Mitchell v. Brown & Williamson Tobacco Corp., 294

F.3d 1309, 1316 (11th Cir. 2002) (motion for default); Green Leaf Nursery v./ E.I. DuPont De Nemours & Co., 341 F.3d 1292, 1300 (11th Cir. 2003) (motion to amend); Draper v. Reynolds, 369 F.3d 1270, 1274 (11th Cir.) (Motion to disqualify).

A.

First, with respect to the denial of the motion for a default judgment, the entry of a default judgment is appropriate "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by [the Federal Rules of Civil Procedure]." Mitchell, 294 F.3d at 1316 (quoting Fed. R. Civ. P. 55(a)). Prudential complied with these rules.

When a plaintiff is permitted to amend his complaint, the defendant is not required to respond until ten days after the amended complaint has been served, unless the court orders otherwise.

Fed.R.Civ.P. 15(a).

When this case was remanded, Fox filed a motion for leave to amend his complaint, and the magistrate granted that motion. On February 14, 2005, the district court vacated that order thereby reinstating the first amended complaint and giving Prudential 20 days to respond to it. Prudential filed its motion to dismiss on March 3, 2005, within the 20 days required by the district court's order. Because Prudential timely responded to Fox's first amended complaint, the district court did not abuse its discretion in denying the motion for default judgment.

Second, we address Fox's contention that the district court abused its discretion in denying Fox's renewed motion to amend his complaint. The Federal Rules of Civil Procedure require that leave to amend should be freely given when justice so requires. Fed.R.Civ.P. 15(a). Generally, a party should be given at least one opportunity to amend before the district court dismisses the complaint with prejudice. Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001). The district court, however, need not "allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previusly allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." I.d.

Here, Fox was permitted to file a first amended coplaint. After that, the magistrate judge granted him permission to file a second amended complaint. Between November 30, 2004 when the magistrate judge granted permission to file a second amended complaint and February 14, 2005 when the district court vacated that order, Fox never filed a second amended complaint. Instead, he filed a series of baseless default motions. Fox caused undue delay and exhibited bad faith in failing to file his second amended complaint. The district court, therefore, did not abuse its discretion in denying Fox's renewed motion to amend his complaint a second time. See id.

C.

Third, we consider Fox's motion to disqualify the court. A judge may be disqualified if his actions violate 28 U.S.C. § 455. Section 455 provides, in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

28 U.S.C. §455. The Supreme Court has held that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 541, 114 S.Ct. 1147, 1150 (1994).

In this case, Fox's conclusory statements that "secret discussions" between Prudential and the court "manifestly deflate any confidence in the judiciary" are unsupported by any evidence. No evidence in the record supports Fox's theory that the court became "personally involved in soliciting Prudential and its attorneys to defend this case" in secret discussions. A reasonable person would not find partiality based on bare allegations of bias and nothing more. Nor do we. Fox's motion is based solely on his dissatisfaction with the court's rulings against him, and that is not a valid basis to disqualify the court. Liteky, 510 U.S. at 541, 114 S.Ct. At 1150. The district court did not abuse its discretion in denying the motion to disqualify.

II.

Finally, we review de novo a district court's dismissal under Rule 12(b)(6) for failure to state a claim. Shands Teaching Hosp. and Clinics, Inc. v. Beach St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000).

Fox contends that his termination was an act of retaliation that violated the whistleblower provision of the FCA. That section states that an employee:

> who is . . . discriminated against in the terms and conditions of employment by his . . . employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [the FCA], including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h).

A prior panel of this Court ruled that Fox's first amended complaint "arguably stated" a retaliation claim under § 3730(h). "Under the 'law of the case' doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." Heathcoat v. Potts, 905 F.2d 367, 370 (11th Cir. 1990) (internal quotation marks and citation omitted). When a court decides a question of law, the law of the case doctrine applies unless: (1) "new and substantially different evidence is produced, or there has been a change in the controlling authority" since the prior decision; or (2) "the prior decision was clearly erroneous and would result in a manifest injustice." Oladeinde v. City of Birmingham, 230 F.3d 1275, 1288 (11th Cir. 2000) (citations omitted).

In this case, the district court dismissed Fox's first amended complaint for failure to state a claim. The prior panel reversed and held that Fox's first amended complaint "arguably stated" a retaliation claim. That prior holding, specifically the reversal of the district court's Rule 12(b)(6) ruling, is binding on the district court and this Court under the law of the case doctrine. Neither of the exceptions to the law of the case doctrine apply: (1) no new or different evidence has been produced and there has been no change in controlling precedent; and (2) the decision refusing to dismiss Fox's claim will not result in manifest injustice. See Oladeinde, 230 F.3d at 1288. This, we are compelled to hold that the district court erred dismissing Fox's complaint for failure to state a claim.

The magistrate judge concluded that Fox improperly served process, but the district court did not reach that issue and neither do we. The district court is free to address it on remand.

III.

The district court did not abuse its discretion in denying Fox's motion for default, to amend his complaint, and to disqualify the court. The district court improperly dismissed without prejudice Fox's complaint for failure to state a claim under Rule 12(b)(6). **AFFIRMED** in part, **REVERSED** and **REMANDED** in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT COURT

No. 05-14665

CALVIN DAVID FOX,

Plaintiff-Appellant,

versus

PRUDENTIAL FINANCIAL,
d.b.a. Prudential Securities, Inc.,
A.k.a. Prudential Insurance,
NEW YORK STOCK EXCHANGE,

Defendants-Appellees.

On appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: [June 20, 2006]

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT COURT

No. 03-16357
Non-Argument Calendar

D.C. Docket No. 03-80081-CV-KLR

CALVIN DAVID FOX,
for himself and The People of the
United States and the State of Florida,
Plaintiff-Appellant,

versus

PRUDENTIAL FINANCIAL,
d.b.a. Prudential Securities, Inc.,
A.k.a. Prudential Insurance,
NEW YORK STOCK EXCHANGE,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 19, 2004)

Before: BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Calvin David Fox,[1] a former employee of Prudential Financial ("Prudential"), filed a False Claims Act ("FCA") complaint against Prudential, alleging that Prudential had engaged in money laundering and conspiracy to conceal money laundering, and that when Fox brought this conduct to the attention of Prudential's CEOs, he was retaliated against by being discharged. Fox later amended his complaint to include the New York Stock Exchange ("NYSE") as a defendant, reiterating his earlier claims against Prudential and alleging that the NYSE ignored Prudential's misconduct.

---

[1] According to the appellate brief, Fox is a licensed attorney. In this case, he is proceeding pro se.

The magistrate judge issued a report and recommendation that the complaint be dismissed sua sponte for failure to state a claim upon which relief could be granted. The magistrate judge found that Fox merely had copied the statutory language, but that he had not explained how the alleged money laundering violated the FCA or how it constituted a false statement concealing obligations to the United States. The magistrate judge further concluded that a private person had no right to bring an action under the Act for money laundering. The district court adopted the magistrate judge's report and recommendations over Fox's objections.

A district court's dismissal for failure to state a claim is reviewed de novo. United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc). Questions of statutory interpretation also are reviewed de novo. Id. Generally, a district court may not dismiss a complaint sua sponte, unless the "factual and legal inadequacies" are irremediably insufficient. Byrne v. Nezhat, 261 F.3d 1075, 1127 n.99 (11th Cir. 2001); Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc., 695 F.2d 524, 527 (11th Cir. 1983).

A. Claims of Prudential's Misconduct

The FCA provides that any person who:

> knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty . . .

31 U.S.C. § 3729(a)(7).

The FCA further empowers private persons ("realtors") to bring suit on behalf of the United States for false or fraudulent claims made against the government, with the promise of a share of the damages recovered serving as incentive for such private enforcement actions. United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1496-97 (11th Cir. 1991). "[A] central question in False Claims Act cases is whether the defendant ever presented a 'false or fraudulent claim' to the government." United States ex rel. Clausen v. Laboratory Corp. of America, Inc., 290 F.3d 1301, 1311 (11th Cir. 2002). This court has held that in order to plead fraud with specificity, a FCA complaint "must allege the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them." Cooper v. Blue

Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 568 (11th Cir. 1994); see also Fed.R.Civ.P. 9(b). In addition, the complaint "must include facts as to [the] time, place, and substance of the defendant's alleged fraud." Id. at 567. If the complaint lacks such basic information, then the district court must dismiss the complaint. Id. at 568.

Here, the district court properly concluded that Fox failed to state a claim under the FCA because he did not identify what false statements were made or what obligations Prudential and the NYSE owed the government. Rather, Fox merely alleged that Prudential concealed money, engaged in misconduct, and failed to report money laundering ativities. Fox further alleged tha tthe NYSE failed to investigate Fox's accusations and ignored Prudential's money laundering. As Fox failed to plead fraud with specificity and did not identify what false statement were made to the government, the district court properly dismissed this claim. Cf. Pemco Aeroplex, Inc., 195 F.3d at 1237-38 (holding that the plaintiff sufficiently stated a claim when the complaint alleged that Pemco had a contractual obligation to pay the government and that if Pemco failed to adhere to its obligation). Thus, we affirmed the dismissal of this claim.

B. Claims of Retaliation

The whistleblower provision of the FCA provides in pertinent part that:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employeer because of lawful acts done by the

> employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole . . .

31 U.S.C. § 3730(h).

Here, Fox alleged that he was fired in retaliation for coplaining about Prudential's misconduct. Thus, Fox arguably stated a claim under the whistleblower statute. We conclude, therefore, that the district court erred in dismissing this claim sua sponte. Accordingly, we vacate and remand this issue for the district court to consider Fox's retaliation claim.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistr. Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,

Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
and its wholly owned subsidiary,
PRUDENTIAL SECURITIES; and
THE NEW YORK STOCK EXCHANGE,

Defendants.

_______________________________________/

FIRST AMENDED COMPLAINT

COME NOW, the Plaintiffs, CALVIN DAVID FOX, individually and for THE PEOPLE OF THE

UNITED STATES and THE STATE OF FLORIDA, and sues the Defendants upon this Complaint, to wit:

I.

JURISDICTION

1.) That this Court has exclusive jurisdiction herein under Title 31 U.S. Code Sections 3729 et. seq., the "False Claims Act."

2.) That the Plaintiff, CALVIN DAVID FOX [hereinafter THE PLAINTIFF] is a citizen of Florida and is otherwise sui juris to maintain this action. Under the False Claims Act, the PLAINTIFF brings this action on behalf of himself and the sovereigns, THE UNITED STATES and THE STATE OF FLORIDA.

3.) That the Plaintiff, THE PEOPLE OF THE UNITED STATES [hereinafter THE UNITED STATES] are a necessary party to this cause of action under the False Claims Act.

4.) That the Plaintiff, THE STATE OF FLORIDA, is a necessary party to this cause of action under the False Claims Act.

5.) That the Defendant, PRUDENTIAL FINANCIAL [hereinafter PRUDENTIAL], is a corporation doing business in Palm Beach County, Florida and is otherwise sui juris.

6.) That the Defendant, NEW YORK STOCK EXCHANGE [hereinafter NYSE] is a closely held private corporation, doing business in Palm Beach County, Florida.

II.

STATEMENT OF THE CASE

7.) That during the period, March 9, 1999 up to and including February 7, 2000, the PLAINTIFF was employed at PRUDENTIAL at Fort Lauderdale, Florida.

8.) Commencing on or about April 1999, he became a close acquaintance of Ken Brown, who had been employed as a compliance manager at the Aventura, Florida offices of PRUDENTIAL. Brown subsequently was moved to the Fort Lauderdale offices of

PRUDENTIAL, where Brown was employed as a compliance manager for the PLAINTIFF.

9.) During late night working hours, between April 1999 up to December 16, 1999, when Brown and the PLAINTIFF were together working in the offices, Brown complained to the PLAINTIFF, that he was under the supervision of MICHAEL NOVAK, the manager of the Fort Lauderdale offices and NOVAK overruled BROWN on decisions to reject or require more accurate information concerning the opening and compliance with regard to accounts at the Fort Lauderdale offices of PRUDENTIAL.

10.) That BROWN also complained to the PLAINTIFF, that he was being deposed by PRUDENTIAL and was a scapegoat for

PRUDENTIAL regarding MONEY LAUNDERING by PRUDENTIAL and certain clients at the Aventura, Florida offices of PRUDENTIAL. BROWN complained to the PLAINTIFF that the procedures at PRUDENTIAL, which allowed money laundering , including the overrides by the Branch Managers, like NOVAK, were standard practice throughout the securities industry and at PRUDENTIAL for the seventeen (17) years he had been employed and trained by PRUDENTIAL as a compliance manager.

11.) That BROWN told the undersigned during this period that PRUDENTIAL was taking in millions in moneys, without regard to federal and state rules and was concealing the source of the money, the amounts of moneys, or accurately reporting the owners of the moneys. BROWN repeatedly told the PLAINTIFF that the procedures of PRUDENTIAL, which was one of of five (5) wirehouses for the New York Stock Exchange, for taking in and controlling money,was widespread practice and commonplace in the securities industry.

12.) That in August of 1999 and thereafter, after the PLAINTIFF returned from his training in New York and was licensed to sell securities by the NYSE and National Association of Securities Dealers, the PLAINTIFF was confronted on numerous occasions by violent, screaming former customers of PRUDENTIAL, who vocally and physically questioned why the PLAINTIFF would be selling anything from PRUDENTIAL.

13.) That the PLAINTIFF confronted NOVAK about the violent and screaming former clients of PRUDENTIAL and NOVAK RELATED that such conduct was the product of unethical conduct, misrpresentation, and corruption explained in **SERPENT ON THE ROCK**, Eichenwald (Harpers 1995). Upon reviewing **SERPENT ON THE ROCK**, the PLAINTIFF was informed that PRUDENTIAL was guilty of wide spread criminal misconduct and corruption, but had settled the claims in part, upon its promise UNDER A COURT ORDER to inform new employees of its indictment in **SERPENT ON THE ROCK** .

14.) That PRUDENTIAL has refused, failed and deliberately omitted to inform its new employees of the indictment and misconduct chronicled in **SERPENT ON THE ROCK** as required by the court order therein. Moreover, on **December 16, 1999** at a company meeting attended by up to forty (40) or more employees, Ron Mourno, a senior vice president of PRUDENTIAL announced that Ken Brown had been fired for Money Laundering and specifically stated, that, "the MONEY LAUNDERING, went all the way to the top of PRUDENTIAL" and is not confined to the Aventura offices of PRUDENTIAL.

15.) That on **December 17, 1999**, the PLAINTIFF confronted NOVAK about the money laundering by PRUDENTIAL and demanded and investigation and explanation of how the PLAINTIFF would be able to defend this new charge against PRUDENTIAL.

16.) That PRUDENTIAL ignored and did not respond to the complaints of the PLAINTIFF, but instead paid BROWN a sum on money of not less than six (6) figures to conceal and not talk about PRUDENTIAL's money laundering and gave KEN BROWN a "clean U-4" without any mention of his being fired for money laundering. PRUDENTIAL also coerced or paid others including MOURNO in order to conceal PRUDENTIAL's money laundering.

17.) Furthermore PRUDENTIAL deliberately and intentionally did not report PRUDENTIAL's money laundering OR ITS CLIENTS, WHO WERE ENGAGED IN MONEY

LAUNDERING to any State or Federal entity nor the NYSE, NASD or Securites Exchange Commission at anytime before or since PRUDENTIAL's announcement of MONEY LAUNDERING, which, "goes to the top of PRUDENTIAL."

18.) That on or about February 4, 2000, upon the encouragement of

NOVAK, the Plaintiff, CALVIN DAVID FOX, filed a written complaint concerning ***inter alia***t MONEY LAUNDERING by PRUDENTIAL and retaliation by PRUDENTIAL against CALVIN DAVID FOX and directed to his complaint to WICKHAM SIMMONS, Chairman and CEO at PRUDENTIAL SECURITIES.

19.) CALVIN DAVID FOX's complaint of MONEY LAUNDERING by PRUDENTIAL was forwarded to JAMIE PRICE, the present CEO of PRUDENTIAL SECURITIES and others.

20.) That at the first opportunity on or about

February 7, 2000,

without discussion or warning, in retaliation for his complaints of money laundering and demands for an investigation, PRUDENTIAL fired the PLAINTIFF and has caused him to be unable to work in the Securities industry and has unjustly promoted and supported the pursuit of the revocation of his license before the NYSE in retaliation, in reality as retaliation for the PLAINTIFF'S complaints and demands for an investigation of said MONEY LAUNDERING.

21.) That from MAY 7, 2000 up to and

including the present,

CALVIN DAVID FOX complained to the Defenant, NEW YORK STOCK EXCHANGE, repeatedly about MONEY LAUNDERING by PRUDENTIAL.

22.) That the Defendant, NEW YORK STOCK EXCHANGE,

makes larges sums of money from the moneys brought to it by PRUDENTIAL.

23.) That during the year 2000, the Defendant, PRUDENTIAL, was

also in the process of "going public", which also generates large cash flows for PRUDENTIAL and NYSE.

24.) That from MAY 7, 2000, up to and including the present, the

Defendant, NYSE has utterly ignored the MONEY LAUNDERING complaints of CALVIN DAVID FOX and not investigated, inquire nor report CALVIN DAVID FOX's complaints of MONEY LAUNDERING, to any Federal, State and Local agencies, with jurisdiction over MONEY LAUNDERING issues.

25.) That the PLAINTIFF has been unable to enjoy full and unfettered employment in the securities industry since PRUDENTIAL retaliated against the PLAINTIFF.

26.) The PLAINTIFF has suffered severe permanent hardship, loss of income, decline in and loss of health and personal anguish now and in the future as a direct consequence of the retaliation of PRUDENTIAL for CALVIN DAVID FOX's complaints of MONEY LAUNDERING by PRUDENTIAL.

27.) That the PLAINTIFF has suffered severe, permanent hardship,

loss of Income, severe decline in and loss of health problems and personal anguish now and in the future as a direct consequence of the assistance in concealing PRUDENTIAL's MONEY LAUNDERING, by NYSE.

III.

FALSE CLAIMS ACT

COME NOW, the PLAINTIFFS and sue the DEFENDANTS and hereby allege:

28.) That the foregoing allegations in paragraphs 1 to 27 are realleged herein **pro haec verba**.

29.) That PRUDENTIAL and NYSE have has all time material hereto, knowingly made, used or caused to be made or used, false records or statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State and/or Federal Government.

30.) That the PLAINTIFFs have been damaged as a direct and proximated cause of the acts and omissions of PRUDENTIAL and NYSE.

30.) That in JULY 1999 PRUDENTIAL announced through its Chairman, Wickham Simmons, that PRUDENTIAL has in excess of seventy billion (70,000,000,000) dollars in excess cash, which it was deciding what to do with.

31.) That the PLAINTIFFs have hired counsel for this claim.

WHEREFORE, the PLAINTIFFS, pray that this Court will enter its judgment for double back pay, interest and compensation for Plaintiff FOX, together with a sum exceeding twenty five billion dollars together with punitive damages, statutory treble damages, attorneys' fees, costs and such other sums as this Court deems meet and just for all Plaintiffs.

IV.

CONSPIRACY TO CONCEAL

COME NOW, the PLAINTIFFS and sue the DEFENDANTS and allege:

31.) That the foregoing allegations in paragraphs 1 to 27 are realleged herein, **pro haec verba**.

32.) That PRUDENTIAL December 16, 1999 has deliberately concealed civil and criminal misconduct of MONEY LAUNDERING by PRUDENTIAL and others.

33.) That PRUDENTIAL has paid great sums of money and agreed to provide further employment and assistance to ensure the silence of employees and participants to conceal MONEY LAUNDERING.

34.) That PRUDENTIAL has pursued a groundless complaint of misconduct against the PLAINTIFF, in the direct face of his MONEY LAUNDERING complaint against PRUDENTIAL and others, with the full knowledge, assistance and cooperation of the NEW YORK STOCK EXCHANGE. in order to conceal and obfuscate complaints of MONEY LAUNDERING by CALVIN DAVID FOX.

35.) That the PLAINTIFFS have been damaged by the wrongful acts and omissions of the DEFENDANTS.

36.) That the PLAINTIFFs have been required to hire counsel to pursue this claim.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the PLAINTIFFS, pray that this Court will enter its Judgment to reinstate the Plaintiff together with double back pay, interest and compensation, for Plaintiff FOX, together with a sum in excess of twenty five billion dollars together with punitive damages; statutory treble damages and attorney's fees and costs and such other sums as this Court deems meet and just for all Plaintiffs.

RETALIATION

COMES NOW, the Plaintiff, CALVIN DAVID FOX, and sues the DEFENDANTS and alleges:

37.) That the allegations of paragraphs 1 to 27 are realleged herein ***pro haec verba***.

38.) That this cause is specifically authorized by and brought under
Section 3730(h) of Title 31 U.S. Code.

39.) That in direct retaliation for the complaints of MONEY LAUNDERING by PRUDENTIAL and others, PRUDENTIAL retaliated against your PLAINTIFF by the manufacture of a groundless complaint with the NYSE and fired him.

40.) That the defendant, NYSE has further ignored and obfuscated the complaints of retaliation by PRUDENTIAL and the complaints of MONEY LAUNDERING by PRUDENTIAL and allowed the groundless complaint against your PLAINTIFF to proceed and be decided without any consideration of retaliation by PRUDENTIAL or MONEY LAUNDERING by PRUDENTIAL and others as the source of the manufactured, groundless complaint by PRUDENTIAL against your PLAINTIFF.

41.) That as a direct and sole cause of said manufactured, groundless complaint and retaliation and support of it by the NYSE, your PLAINTIFF has been unable to secure any employment anywhere in the securities industry, or anywhere else since February 7, 2000.

42.) That as a direct and proximate consequence of the wrongful retaliation of PRUDENTIAL as directly and knowing supported by NYSE, your PLAINTIFF has suffered damages, including but not limited to permanent health loss and decline, loss of income, loss of ability to enjoy life; and personal anguish, now and in the future.

43.) That the PLAINTIFF has been required to hire counsel to pursue this claim.

WHEREFORE, your Plaintiff, CALVIN DAVID FOX, demands judgment against the DEFENDANTS, jointly and severally for reinstatement with double back pay, interest and compensation for Plaintiff FOX, together with damages in excess of ten million dollars, actual damages and punitive and exemplary damages and include attorneys fees and costs in its award for all Plaintiffs.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

RETURN OF SERVICE AFFIDAVIT

UNITED STATES DISTRICT COURT
CASE: 03-80081
SOUTHERN DISTRICT OF FLORIDA
CIVIL DIVISION

SUMMONS, AMENDED COMPLAINT

CALVIN DAVID FOX

VS.

PRUDENTIAL FINANCIAL

WITNESS FEE $8.75

Pursuant to the request of Calvin David Fox, Post Office Box 7900, Jupiter, FL. VAUSE'S PROCESS SERVICE, received this process on November 16, 2004 at 10:00 A.M.

I, J. LEE VAUSE, SECOND CIRCUIT, ID served same on **PRUDENTIAL FINANCIAL C/O THE FLORIDA SECRETARY OF STATE PER FS 48.181 AND 607.1109**, at SERVED AT: 409 EAST

GAINES STREET, TALLAHASSEE, FL 32399 on

NOVEMBER 17, 2004 at 08:45 A.M.

SECRETARY OF STATE

By Delivering a true copy of the above document(s) together with the date and hour of service endorsed thereon by me to **YVETTE MCGEE** of the State Of Florida, as the designated agent to accept service of process for and on behalf of the within named defendant **PRUDENTIAL FINANCIAL C?O THE FLORIDA SECRETARY OF STATE PER FS 48.181 AND 607.1109** and at the same time delivering into the hand of said Secretary of State in his above mentioned official capacity the sum of 8.75 as provided by FS 48.161.

VAUSE'S PROCESS SERVICE
PO BOX 1777
TALLAHASSEE, FL 32302
OFFICE (805) 656-2605

J. LEE VAUSE, SECOND
CIRCUIT, ID #81

The foregoing instrument was acknowledged before me this day by the process server who is personally known to me. November 18th, 2004.

NOTARY

FLORIDA DEPARTMENT OF STATE
Glenda E. Hood
Secretary of State

December 10, 2004

CALVIN DAVID FOX
P.O. BOX 7900
JUPITER, FL 33468-7900

Pursuant to Chapter 48.181, Florida Statutes, a copy of the process and initial pleading, case number 03-80081, was accepted for PRUDENTIAL FINANCIAL, and was filed on November 17, 2004, at 04:00 PM.

Plaintiff(s)

CALVIN DAVID FOX for himself and THE PEOPLE OF THE UNITED STATES; and THE STATE OF FLORIDA,

-vs-

Defendant(s)

PRUDENTIAL FINANCIAL, et.al.,

Only questions concerning the actual filing of the summons and complaint should be directed to our office at (850) 245-6953. All other inquiries should be made to the attorneys involved.

Yvette McGee
Processor of Service
DIVISION OF CORPORATIONS

Letter No. 404A00066441

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 03-80081-CIV-
RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,

Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.

Defendants.
____________________________________/

MOTION FOR LEAVE TO AMEND and SERVE AMENDED COMPLAINT

COME NOW, the Plaintiffs, CALVIN DAVID FOX, individually and for THE PEOPLE OF THE

UNITED STATES and THE STATE OF FLORIDA, and submit this Motion for Leave to Amend and serve Amended Complaint, to wit:

1.) That at Docket Entry 28 this Court has received the mandate of the 11th Circuit Court of Appeal upon the 11trh Circuit Court's opinion, in which the Court reinstates one of two claims of the undersigned, which this Court had previously dismissed without prejudice **before service of process**.

2.) That the Plaintiff is desirous of amending his complaint in order to meet the requirements of the llth Circuit Court opinion and to provide this Court with additional information and facts, which were not available nor pleaded to in this matter previously.

3.) That the present cause has only been amended once to add a party.

4.) That said allegations would support meritorious claims before this Court.

5.) That the present claims are being served contemporaneously with this motion.

6.) That this motion is not presented for purposes of hindrance or delay, but rather only such that this cause will be properly heard on the merits.

7.) That as reflected in the llth Circuit Court

opinion, this cause may

be properly pleaded as a cause of action under the False Claims Act, 31 U.S.C. Title 3729 et seq. and the substantive law. The present cause is eminently well-suited to the intent and purpose of the Act.

8.) That this Court should freely allow this amendment, where justice so requires at this early stage of the proceedings. FRCiv.P. 15.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Plaintiff, CALVIN DAVID FOX, prays that this Court will grant this motion to allow a second amended complaint and service of said second amended complaint.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80081-civ-Ryskamp/Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES,
and THE STATE OF FLORIDA,

Plaintiff,

vs.

PRUDENTIAL FINANCIAL, d/b/a, docketing
PRUDENTIAL SECURITIES, f/k/a
PRUDENTIAL INSURANCE or PRUCO,

Defendant.
______________________________/

ORDER

THIS CAUSE is before the Court on Order of Reference (DE 30) from United States District Judge Kenneth L. Ryskamp "to take all necessary and proper action as required by law and to submit a Report and Recommendation to [the District] Court." On March

21, 2003, Plaintiff filed his First Amended Complaint pursuant to the False Claims Act alleging that Prudential engaged in money laundering and conspiracy to conceal money laundering and that Prudential manufactured a groundless complaint against him with the New York Stock Exchange and fired him in retaliation for his complaints about the money laundering, in violation of 31 U.S.C. § 3730(h). Plaintiff also alleged that the New York Stock Exchange ignored Prudential's misconduct.

On September 25, 2003, this Court recommended dismissal of Plaintiff's First Amended Complaint for failure to state a cause of action (DE 17); the District Court adopted the report and dismissed the case (DE 22) on November 7, 2003. Plaintiff appealed. On April 19, 2004, the Eleventh

Circuit affirmed the dismissal of Plaintiff's claims regarding Prudential's alleged money laundering but reversed the dismissal of Plaintiff's retaliation claim.

Now pending before the Court is Plaintiff's Motion for Leave to Amend and Serve Amended Complaint (DE 32), filed November 12, 2004. Federal Rule of Civil Procedure 15(a) provides that the court shall grant a plaintiff leave to amend a complaint "when justice so requires." Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Leae to Amend and Serve Amended Complaint (DE 32) is GRANTED. Plaintiff is granted leave to amend his complaint for retaliation pursuant to 31 U.S.C. § 3730(h), in accordance with the Eleventh Circuit Opinion.

DONE and ORDERED in Chambers at West Palm Beach in the Southern District of Florida, this 24 day of November 2004.

ANN E. VITUNAC
Chief United States Magistrate Judge

Copies to:

Calvin David Fox, *pro se*
P.O. Box 7900
Jupiter, FL 33468-7900

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80081-civ-Ryskamp/Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES,
and THE STATE OF FLORIDA,

Plaintiff,

vs.

PRUDENTIAL FINANCIAL, d/b/a, docketing
PRUDENTIAL SECURITIES, f/k/a
PRUDENTIAL INSURANCE or PRUCO,

Defendant.
__________________________________/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Order of Reference (DE 30) from United States District Judge Kenenth L. Ryskamp "to take all necessary and proper action as required by law and to submit a Report and Recommendation to [the District] Court." Pending before the Court is Plaintiff's Motion for a Default (DE 35), filed December 17, 2004. Plaintiff asks the Court to enter default against Defendant Prudential Financial. Plaintiff states that he served Prudential with a copy of the First Amended Complaint on November 17, 2004, and that Prudential has failed to file an answer.

Plaintiff filed his First Amended Complaint on March 21, 2003, pursuant to the False Claims Act, alleging that Prudential engaged in money laundering and conspiracy to conceal money laundering and that Prudential manufactured a groundless complaint against him with the New York Stock Exchange and fired him in retaliation for his complaints about the money laundering, in violation of 31 U.S.C. § 3730(h).

Plaintiff also alleged that the New York Stock Exchange ignored Prudential's misconduct.

On September 25, 2003, this Court recommended dismissal of Plaintiff's First Amended Complaint for failure to state a cause of action (DE 17); the District Court adopted the report and dismissed the case (DE 22) on November 7, 2003. Plaintiff appealed. ON April 19, 2004, the Eleventh Circuit affirmed the dismissal of Plaintiff's claims regarding Prudential's alleged money laundering but reversed the dismissal of Plaintiff's retaliation claim. Thus, only Plaintiff's retaliation claim remains.

On November 30, 2004, this Court granted Plaintiff's Motion for Leave to Amend and Serve Amended Complaint (DE 32). The Court granted Plaintiff leave to amend his complaint for retaliation pursuant to 31 U.S.C. § 3730(h), in accordance with the Eleventh Circuit opinion. Plaintiff has not yet filed or served his Second Amended Complaint. However, in his Motion for a Default, Plaintiff asks the Court to enter default against Prudential for failure to answer the First Amended Complaint. Accordingly, the Court hereby

RECOMMENDS that Plaintiff's Motion for a Default (DE 35) be DENIED.

Any party may serve and file written objections to this Report and Recommendation with the Honorable Kenneth L. Ryskamp, within ten (10) days after being served with a copy. See 28 U.S.C. § 636(b)(1)(C). Failure to file timely objections may limit the scope of an appellate review of factual findings contained herein. See United States v.

Warren, 687 F.2d 347, 348 (11th Cir. 1982) cert. denied, 460 U.S. 1087 (1983).

DONE and RECOMMENDED in Chambers at West Palm Beach in the Southern District of Florida, this 22 day of December 2004.

ANN E. VITUNAC
Chief United States Magistrate Judge

Copies to:
Calvin David Fox, *pro se*
P.O. Box 7900
Jupiter, FL 33468-7900

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,

Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.

Defendants.

_______________________________________/

MOTION FOR A DEFAULT

COME NOW, the Plaintiffs, CALVIN DAVID FOX, individually and for THE PEOPLE OF THE

UNITED STATES and THE STATE OF FLORIDA, and submit this Motion for A Default, to wit:

1.) That as reflected in the proof of service of process submitted herewith, the Defendant, PRUDENTIAL FINANCIAL was served on November 17, 2004 with the First Amended Complaint. **See, Exhibit A.**

2.) That the Defendant, Prudential Financial has failed to served any paper as required by law and Rule 15 Federal Rules of Civil Procedure.

3.) That the Plaintiff, Calvin David Fox, is entitled to a Default Judgment upon his claim as required by law.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Plaintiff, CALVIN DAVID FOX, prays that this Court will grant this Motion for a Default and enter judgment as to liability.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CLERK'S DEFAULT

CASE NO. 03-cv-80081-RYSKAMP

CALVIN DAVID FOX,
Plaintiff(s),

vs.

PRUDENTIAL FINANCIAL,
Defendant(s).
/

It appearing that the defendant(s) herein, **Prudential Financial,** is in default for failure to appear, answer or otherwise plead to the complaint filed herein within the time required by law. Default is hereby entered against defendant(s) Prudential Financial, as of course, on this date February 3, 2005.

CLARENCE MADDOX
CLERK OF COURT

cc: Hon.

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

RENEWED MOTION TO REHEAR AND TO CONSIDER TIMELY FILED OBJECTIONS TO MAGISTRATE REPORT; RENEWED STATEMENT OF NO INTENT TO AMEND EMPLOYMENT CLAIM; RENEWED MOTION FOR A DEFAULT

COMES NOW, the Plaintiff, CALVIN DAVID FOX, and submits this Renewed Motion to Rehear and

Consider Timely Served Objections to Magistrate Report; Renewed Statement of No Intent and Withdrawal of Motion to Amend, which the Magistrate applied to the Plaintiff's Employment Claim; and Renewed Motion for a Default, to wit:

I.

OBJECTIONS TO MAGISTRATE REPORT WERE TIMELY FILED

1.) That the Plaintiff is in receipt of this Court's order dated January 13, 2005, which was **filed** on January 14, 2005; but as reflected in the attached copy of this Court's envelope, was **not served** upon the Plaintiff until **January 21, 2005**, eight (8) days after it was signed. **Exhibit A**.

2.) Similarly, the Magistrates Report signed on **December 22, 2004**, but, as reflected on this Court's envelope, a copy of which is attached to the Plaintiff's Objections, was **not served** upon the Plaintiff until **January 5, 2005**, fourteen (14) days after it was signed. **Exhibit B**.

3.) That the Plaintiff's objections to the Magistrates Report noted the delayed service and timely filed objections to the Magistrate's report were thus timely filed on **January 13, 2005**.

4.) That because of the severe delay, the Plaintiff also entitled his Objections, filed on January 13, 2005 as a Motion to Rehear any order sustaining the Magistrates, report, which the Plaintiff would assert hereby.

5.) That the Plaintiff apologizes to this Court for even bringing this up, but would suggest that because of the recent and continuing closure of the West Palm

Beach offices of the Court, that there has developed a severe delay in the service of this Court's orders.

II

NO INTENT TO AMEND EMPLOYMENT CLAIM; NOTICE OF WITHDRAWAL OF MOTION TO AMEND WHICH MAGISTRATE APPLIED TO EMPLOYMENT CLAIM

6.) That the Magistrate recommends that no Default be entered upon the ground that the PLAINTIFF has sought to amend his employment complaint, "**in accordance with the Eleventh Circuit opinion**." This is an error. The Eleventh Circuit opinion did **not** require the PLAINTIFF to amend his employment complaint. The Eleventh **reversed** upon the ground that the PLAINTIFF's employment complaint was **sufficient as stated**. There was no requirement to amend the **employment** complaint.

7.) Furthermore, the Magistrate's Recommendation that this Court deny the PLAINTIFF's Motion for Default upon the ground that the Magistrate granted the PLAINTIFF'S Motion to Amend is equally **error**. The Magistrates' order allowing the amendment provides that the PLAINTIFF may **only** amend the **employment** claim.

8.) The PLAINTIFF has **no** desire to and did **not** intend nor ask at any time to amend the employment claim, which the Eleventh Circuit has found sufficient as filed and has required no amendment.

9.) That the Plaintiff hereby withdraws his Motion to Amend, which the Magistrate applied to the Plaintiff's employment claim.

III.

RENEWED MOTION FOR DEFAULT

10.) That as reflected in the proof of service of process filed in this Court, the Defendant, PRUDENTIAL FINANCIAL was served on **November 17, 2004** with the First Amended Complaint.

11.) That the Defendant, Prudential Financial has failed to served any paper as required by law and Rule 15 Federal Rules of Civil Procedure.

12.) That the Plaintiff, Calvin David Fox, is entitled to a Default Judgment upon his claim as required by law.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Plaintiff, CALVIN DAVID FOX, prays that this Court will Rehear this Court's Order Sustaining Magistrate's Report and that this Court will Consider the Plaintiff's timely filed objections to the Magistrate's Report; that this Court will allow the withdrawal of the Motion to Amend, as the Magistrate has applied it to the Plaintiff's Employment Claim; and that this Court will grant this Motion for a Default and judgment as to liability.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

OMNIBUS ORDER

THIS CAUSE comes upon the Plaintiff Calvin David Fox's Renewed Motion to Rehear and to Consider Timely Filed Objections to Magistrate Report; Renewed Statement of No Intent to Amend Employment Claim; Renewed Motion for a Default

("Renewed Motion") **[DE 41]** filed on February 1, 2005. In that motion, Plaintiff objects, for the second time, to the Report and Recommendation issued by Chief Magistrate Judge Ann E. Vitunac on December 22, 2004 **[DE 37]**, and again moves the Court to grant its Motion for a Default **[DE 35]**. Plaintiff also withdraws his Motion to Amend **[DE 32]**, which the Chief Magistrate Judge granted on November 30, 2004 **[DE 34]**.

This Court already considered Plaintiff's arguments in its Order Denying Plaintiff's Motion to Rehear Any Order Sustaining **[DE 40]** of January 21, 2005, and is not persuaded by Plaintiff's Renewed Motion to depart from that Order. Additionally, Plaintiff may not withdraw a motion after it has been ruled upon by the Court. Rather, Plaintiff was ordered to file a motion to vacate the Order **[DE 34]** granting him leave to amend and to reinstate its First Amended Complaint. Given the Plaintiff's *pro se* status, the Court wi[illegible]low him some leeway in his filings and thereby consider this Renewed Motion **[DE 41]** as a motion to vacate.

THE COURT has considered the Renewed Motion **[DE 41]** and the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

(1) Plaintiff's Renewed Motion to Rehear and to Consider Timely Filed Objections to Magistrate Report **[DE 41]** is DENIED; and

(2) Plaintiff's Renewed Motion for a Default **[DE 41]** is DENIED;

(3) The Chief Magistrate Judge's Order **[DE 34]** is VACATED; and

(4) Defendant shall file a response to the First Amended Complaint **[DE 7]** within twenty (20) days of being served with this Order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 11 day of February, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Prudential Financial

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

ORDER STRIKING DEFAULT

THIS CAUSE comes before the Court *sua sponte*. Based upon a review of the record, the Court discovered that a default was entered by the Clerk of the Court on February 3, 2005 **[DE 42]**. However, the Court previously entered an Order Adopting Record and Recommendation **[DE 39]**, in which it denied Plaintiff's Motion for a Default. Additionally, the Court subsequently denied the Plaintiff's motion for reconsideration of that order and renewed motion for a default **[DE 40,43]**. Accordingly, it is hereby,

ORDERED AND ADJUDGED that the default entered by the Clerk of the Court **[DE 42]** is STRICKEN.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 15 day of February, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Prudential Financial

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.

_______________________________________/

AMENDED RENEWED MOTION FOR A DEFAULT

COMES NOW, the Plaintiff, CALVIN DAVID FOX, individually and and submits this Amended Renewed Motion for A Default, to wit:

1.) That on **February 3, 2005** the Clerk of the Court entered a default against Prudential Financial (DE 42).

2.) That the Plaintiff is in receipt of an "Omnibus Order" dated **February 11, 2005**, which was filed on **February 14, 2005**, but was not served until **February 18, 2005** (DE 43).

3.) That in this Court's order of February 11th, this Court has vacated the Magistrate's order allowing an amended complaint in this cause, which was the putative impediment to the entry of a default (DE 43).

4.) That as reflected in the proof of service of process herein, the Defendant, PRUDENTIAL FINANCIAL was served with the Complaint more than ninety (90) days previously on **November 17, 2004**.

5.) That the Defendant, Prudential Financial has failed to served any paper as required by law and Rule 15 Federal Rules of Civil Procedure.

6.) That there is no lawful reason for this Court to deny the entry of a default judgment against Prudential Financial and the Plaintiff is entitled to a default judgment as a matte. of law.

7.) That this Court should not compromise its impartiality by inserted itself into the defense of Prudential Financial by ***sua sponte*** causing yet additional notice to Prudential Financial that it should defend this cause.

WHEREFORE, upon the foregoing, the Plaintiff, CALVIN DAVID FOX, prays that this Court will enter a Default Judgment against Prudential

Financial as to liability and amend its February 11th order accordingly.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP/VITUNAC

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
______________________________________/

ORDER DENYING AMENDED RENEWED MOTION FOR A DEFAULT

THIS CAUSE comes before the Court upon the Plaintiff's Amended Renewed Motion for a Default **[DE 45]** filed on February 25, 2005. This motion constitutes Plaintiff's fourth request for the Court to enter a default judgment against Defendant, Prudential

Financial **[DE 35, 38, 41, 45]**. The previous three motions have raised the same grounds, and have been denied by this Court **[DE 39, 40, 43]**. The Court reminds Plaintiff of his obligations under Fed.R.Civ.P. 11, and of the sanctions that may be entered against him for violations of the rule. As for the current motion, Plaintiff is incorrect in asserting that the Defendant has failed to respond to Plaintiff's First Amended Complaint **[DE 7]** within the required time. In its Omnibus Order of February 14, 2005 **[DE 43]**, the Court allowed Defendant to respond within twenty (20) days of being served with this Order. By Plaintiff's own admission, that Order was not served until February 18, 2005. Accordingly, the time for Defendant to respond to the First Amended Complaint **[DE 7]** has not yet passed, and it is hereby, ORDERED and ADJUDGED that Plaintiff's Amended Renewed Motion for a Default **[DE 45]** is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 1 day of March, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Prudential Financial

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_____________________________________/

MOTION TO REHEAR AND VACATE ORDERS DE 43 AND DE 44; SECOND AMENDED RENEWED MOTION FOR A DEFAULT

COMES NOW, the Plaintiff, CALVIN DAVID FOX, individually and and submits this Amended Renewed Motion for A Default, to wit:

1.) That on **February 3, 2005** the Clerk of the Court entered a default against Prudential Financial (DE 42).

2.) That the Plaintiff is in receipt of an "Omnibus Order" dated **February 11, 2005**, which the Court has apparently served upon an unidentified "Prudential" and allowed the unidentified "Prudential" **file** a response herein within twenty (20) days of service of said order (DE 43).

3.) That said order was apparently "served" by the Court upon "Prudential' sometime on or about **February 11, 2005**, when it was signed.

4.) That as reflected in the proof of service of process herein, the Defendant, PRUDENTIAL FINANCIAL was served with the Complaint almost one hundred and twenty (120) days previously on **November 17, 2004**.

5.) That the Defendant, Prudential Financial has failed to served any paper as required by law and Rule 15 Federal Rules of Civil Procedure.

6.) That the Plaintiff has filed an "Amended Renewed Motion for a Default," which is adopted and alleged herein.

7.) Said Amended Renewed Motion for a Default is based upon the Clerk's Default and that the Court's Omnibus order vacated any impediment to a default herein.

8.) That "Prudential" has failed to comply with this Court's Omnibus order to file a response herein within twenty days of service of said order.

9.) That there is no lawful reason for this Court to deny the entry of a default judgment against Prudential Financial and the Plaintiff is entitled to a default judgment as a matter of law.

10.) That this Court should not compromise its impartiality by inserting itself into the defense of Prudential Financial, **a.)** by ***sua sponte*** causing additional notices to Prudential Financial that it should defend this cause; **b.)** by **sua sponte** vacating the clerk's default (DE 44); **c.)** by **sua sponte** providing service of copies to a unidentified "Prudential" source, which is Prudential or an agent of the Defendant; and **d.)** by this Court or its staff at the Court direction making **ex parte** contact with an unidentified "Prudential" or its agent, to notify them to defend this cause.

LATE MAILING BY THE CLERK

11.) That the Plaintiff would respectfully request that the Court direct the Clerk's office to correct the bizarre delay between the signing of documents and the service of those documents upon the undersigned. For example, again in the present circumstance there was considerable delay in the mailing of the present order (DE44) vacating the Clerk's default, which was signed and filed on **February 15, 2005** but was not served upon the undersigned until fourteen (14) days later on **March 1, 2005**. **Exhibit A**.

12.) That in the **considerable** experience of the undersigned with this Court in the past and with many other state and federal courts, mailings by the Clerk of

Court are customarily made the day of filing or at the latest by the next day.

WHEREFORE, upon the foregoing, the Plaintiff, CALVIN DAVID FOX, prays that this Court will enter a Default Judgment against Prudential Financial as to liability and that the Court will rehear, vacate and amend its February 11th order (DE 43) and February 15th (DE 44) order accordingly and that this Court will direct prompt mailing of all documents by the Clerk's office.

CALVIN DAVID FOX

P.O. Box 7900

Jupiter, Florida 33468-7900

(954) 383-5943

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80081-CIV-RYSKAMP/VITUNAC

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

ORDER DENYING MOTION TO REHEAR AND VACATE ORDERS DE43 AND DE44; SECOND AMENDED RENEWED MOTION FOR A DEFAULT SERVE AMENDED COMPLAINT

THIS CAUSE comes before the Court upon the Plaintiff's Motion to Rehear and Vacate Orders DE43 and DE44; Second Amended Renewed Motion for a

Default **[DE 49]** filed on March 4, 2005. This motion constitutes Plaintiff's fifth request for the Court to enter a default judgment against Defendant, Prudential Financial **[DE 35, 38, 41, 45, 49]**. The previous four motions have essentially raised the same grounds, and have all been denied by this Court **[DE 39, 40, 43, 46]**. Despite the Court's warning to Plaintiff in its previous Order **[DE 46]**, Plaintiff has again renewed the same request for the fifth time. Additionally, Plaintiff has now, on two occasions, leveled a serious charge against this Court of partiality in these proceedings. *See* Am. Renewed Mot. for Default, at ¶ 7 **[DE 45]**; Sec. Am. Renewed Mot. for Default, at ¶ 10 **[DE 49]**. Plaintiff's successive motions constitute a needless waste of this Court's resources, and any further renewal of this motion will result in sanctions against Plaintiff. *See* Fed.R.Civ.P. 11.

The Court has considered Plaintiff's motion, and the pertinent record before it, and it is hereby,

ORDER and ADJUDGED that Plaintiff's Motion to Rehear and Vacate Orders DE43 and DE44; Second Amended Renewed Motion for a Default [DE 49] is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 11 day of March, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Prudential Financial

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

OBJECTIONS TO MAGISTRATE REPORT; MOTION TO DISQUALIFY THE COURT

COMES NOW, the Plaintiff, CALVIN DAVID FOX, and submits this Motion to Disqualify and Objections to Magistrates Report and prays that this

Court will review this matter de novo and reject the Magistrate's Report:

1.) That on or about May 12, 2005 the Magistrate's Report and Recommendation was **served** by mail upon the Plaintiff, in which the Magistrate recommends that this cause be dismissed without prejudice.

2.) That the Plaintiff's Objections to said report are therefore due to be served on or about May 31, 2005.

REVIEW OF HISTORY OF CASE ERRONEOUS

The Magistrate's summary of the First Amended Complaint is erroneous and incomplete.

Ex Parte Letter by U.S. Attorney is Not an Appearance By the United States and has no Value to Any Issue herein

That on August 8, 2003 the Plaintiff caused re-service upon five (5) federal offices other than the United States Attorney for the Southern District of Florida and reported that service to the Court with a Re-Notice of Service and attachments. At least one of those federal agencies, which are part of a **national** money laundering task force, has interviewed the Plaintiff and is apparently conducting a money laundering investigation of the Defendants, which was initiated based upon the allegations in the Plaintiff's Complaint. There are at least two other agencies, which have opened files and may be proceeding against Prudential upon the money laundering complaint by the Plaintiff herein.

That Magistrate refers only to an **ex parte** letter forwarded by the "Government", which apparently was produced by a local office of the U.S. Attorney, which may not be involved in the national money laundering task force. Neither the "government" letter nor the Notice [DE 16], which the Magistrates Report says refers to the government letter, was ever been received by the Plaintiff, prior to the Notice of Appeal in this matter.

The five (5) federal agencies, which are involved in the national money laundering task force, have **not** as the Magistrate's Report suggests again, "elected to not intervene" nor have any of those agencies advised the Plaintiff that the Plaintiff does not have "a cognizable claim under the False Claims Act." The Plaintiff would suggest to this Court that the present widely publicized investigations of the NYSE and its "corporate governance" are not unrelated to the present allegations of corruption and money laundering by Prudential.

The limitations imposed upon the use of the **qui tam** statute suggested by the Magistrates Report and based upon the "Government" letter are not justified nor supported by the intent of the statute; the face of the False Claims Act, 31 U.S.C. Title 3729 et seq.; nor by the substantive law. The plain and well settled intent of the False Claims Act was to encourage citizens to act as private attorney's general to uncover crimes and fraud, which otherwise would have gone unreported. The present cause is eminently well-suited to the intent and purpose of the Act.

The Plaintiff did not **only** claim that Prudential committed money laundering. Prudential **confessed** at a meeting of more than thirty (30) employees to money laundering and that the money laundering, "goes to the very top of Prudential" and Brown and others have been paid six figures to conceal the money laundering. Where a Defendant "confesses" to the crime of "money laundering", which "goes to the top" of the Defendant, a Fortune Five Hundred Company, and there are specific allegations of payoffs to participants to conceal the "money laundering," where by definition, "money laundering" is the concealment of the source of monies in order to avoid payment of taxes or forfeiture to the government, when the true source of the monies are known, **the Plaintiff can maintain this** action.

The Magistrate recites the opinion of the Eleventh Circuit in which the Court sustained this Court's dismissal **without prejudice** of the first part of the Plaintiff's complaint. However, in the Eleventh Circuit's opinion at page 4, the Court clearly provided the basis to Amend the Plaintiff's Complaint.

Furthermore, the Magistrate **incorrectly** recommended in this litigation that this Court deny the PLAINTIFF's Motions for a Default, upon the ground that the PLAINTIFF has requested to amend his **employment** complaint and that the Magistrate allowed the PLAINTIFF to amend his **employment** complaint, although no amended **employment** complaint has been filed.

The Magistrate **incorrectly** based her recommendation upon the ground that the PLAINTIFF has sought to amend his employment complaint, "**in accordance with the Eleventh Circuit opinion**." This is an error. The Eleventh Circuit opinion did **not** require the PLAINTIFF to amend his employment complaint. The Eleventh **reversed** upon the ground that the PLAINTIFF's employment complaint was sufficient as stated. There was no requirement to amend the **employment** complaint.

Furthermore, the Magistrate's Recommendation that this Court deny the PLAINTIFF's Motion for Default upon the ground that the Magistrate granted the PLAINTIFF'S Motion to Amend is equally **error**. The Magistrates' order allowing the amendment provides that the PLAINTIFF may **only** amend the **employment** claim. The PLAINTIFF had **no** desire to and did **not** intend nor ask at any time to amend the employment claim, which the Eleventh Circuit has found sufficient and has required no amendment. As reflected in a the record, the Plaintiff did not file a motion to amend **just** his employment complaint.

The Plaintiff should therefore be allowed to amend his entire complaint, which as noted above was dismissed **without prejudice**.

This Court should Disqualify Itself

Meanwhile, the Plaintiff, as was his right, filed a series of Motions for a Default against Prudential, where Prudential had clearly failed to respond to the complaint and the Clerk entered a default against Prudential. The Magistrate utterly fails to even mention that the Plaintiff thereupon filed a series of Motions for Default, all of which should have been granted.

Most seriously, the Magistrate fails to mention or discuss that this Court and/or its clerks or agents ultimately assisted Prudential in defending this cause, by secretly serving and/or notifying Prudential and/or its counsel that it should get into this case and defend this cause. Instead of granting any default against Prudential, this Court and/or its clerks or agents in a **non-record**, and **ex parte** fashion contacted the Defendant, Prudential and/or its lawyers to urge them to appear and to defend this cause, which they have done and have avoided any default.

There is no necessity for citation to authority here. The Plaintiff is entitled to nothing less than the cold, neutrality of an impartial magistrate. It is only the well founded concern of the Plaintiff that he will not receive fair and impartial treatment that is sufficient to trigger recusal. The mere appearance of impropriety is sufficient to require this Court to recuse itself. In the present cause, the **ex parte** contact by the Court, its clerks and/or representatives with the other side to litigation to enable them to appear and defend this cause, is quite sufficient as grounds for recusal. **E.g., Borjas v. Brescher**, 579 So.2d 399 (Fla. 4th DCA 1991)(reversing and disqualifying trial court, where court had ex parte contact with opposing counsel). This Court should therefore recuse itself from any further consideration of this cause.

Employment Claim is Sufficient

The Magistrate also recites that the Eleventh Circuit also **reversed** this Court's dismissal of the PLAINTIFFS' employment claim, upon the recommendation of the Magistrate. The Eleventh Circuit found the PLAINTIFF's employment complaint sufficient on the face of the statute, which authorizes the employment complaint.

The Magistrate's Adoption of Defendant's Argument is Error

The Magistrate follows the substance of the Defendant's Motion to Dismiss on the merits and ignores the jurisdiction issues raised by both parties, by just saying the Magistrate ignores the jurisdiction issues. The failure to the Magistrate to address the issues relating to whether the Court has jurisdiction in this cause, must be addressed first.

Whether this Court has jurisdiction herein is directly related to this Court's **sua sponte** secret contact with opposing counsel and/or the Defendant as noted above. The Defendant has appeared in this cause, because of service by the Court of **ex parte** notice and **ex parte** contact with the Defendant and or its counsel to defend this matter, which not been revealed to the Plaintiff.

Such service by the Court was sufficient and in any event the Plaintiff is without ability to defend secret **ex parte** notice and process, employed by the Court of which the Plaintiff has no knowledge.

THE DEFENDANT'S CLAIMS and "UNDISPUTED FACTS" IS A WAIVER UNDER STATE LAW OF ANY DEFECTS IN SERVICE

That in a **blatant** attempt to prejudice the Court, the Defendant has defended this matter upon what it's Counsel contends are "**undisputed facts**," and which they claim support a dismissal of this cause on the merits under Rule 12b. **Sub judice**, under Florida law, the Defendant has thereby waived any defects in service of process, where as in the case at bar, the Defendant has challenged the merits of the Plaintiff's claim and the Plaintiff's right to maintain suit.

McKelvey v. McKelvey, 323 So.2d 651 (Fla. 3d DCA 1976); **see, Odom v. Odom,** 568 So.2d 988 (Fla.3d DCA 1990)(by seeking affirmative relief the defendant submitted to the jurisdiction of the Court); **Mo Young v. Air Canada**, 445 So.2d 1102 (Fla. 4th DCA 1984)(motions which go the merits of the complaint constitute a general appearance subjecting the Defendant to the jurisdiction of the Court).

DEFENDANT'S MOTION UNSUPPORTED BY AFFIDAVITS IS FACIALLY INSUFFICIENT

Furthermore, under Florida law, a challenge to jurisdiction based upon the sufficiency of service of process under Florida's long arm statute must be supported by **affidavits** and discovery demonstrating the deficiency. **Venetian Salami Company v. Parthenais**, 554 So.2d 499 (Fla. 1989).

In the case at bar, the Defendant has made a host of factual assertions, without a single affidavit in claiming this cause should be dismissed for insufficient process under Florida's long arm statute and the Defendant's claim should thereby be rejected out of hand. **Id.; see, e.g., Waxol v. Taylor, Brion, Buker**, 711 So.2d 1251 (Fla.3d DCA 1998).

THE 11TH CIRCUIT HAS REJECTED THE STRICT INTERPRETATION OF Section 3730(h)

As for a dismissal on the merits, the Magistrate and Defendant have cited the strict interpretation of Section 3730(h) as favored by panels in the Third, Sixth and Ninth Circuits in **United States ex rel Hopper v. Anton**, 91 F.3d 1261 (9th Cir. 1996);

Hutchins v. Wilentz, 253 F.3d 176 (3d Cir. 2001) and **McKenzie v. Bellsouth**, 219 F.3d 508 (6th Cir. 2000).

First of all the Eleventh Circuit in **Calvin David Fox v. Prudential Financial**, 11th Cir. Case 03-16357-HH (April 19, 2004), reversed this Court's previous dismissal, which was based upon the sufficiency of the Plaintiff's Section 3730(h) claim for this Court to, "consider Fox's retaliation claim." Secondly, in the Defendant's own case law, the Court recites precisely that the Eleventh Circuit and others have declined to follow the strict interpretation of Section 3730(h) recited in the Defendant's cases, to wit:

> "Several circuits has eschewed the formalistic approach set forth by the Fifth Circuit . . . [**citing, inter alia, Childree v. UAP/GA AG Chem**, 92 F.3d 1140, 1146 (llth Cir. 1996)].

McKenzie, 219 F.3d at 515.

See, also, United States ex rel Yesudian, 153 F.3d 731 (D.C. Cir. 1998); **Neal v. Honeywell**, 33 F.3d 860 (7th Cir. 1994). Thus, the Eleventh Circuit like its sister circuits in the 7th and D.C. circuits has decided upon a less than the literal reading of Section 3730(h), allowing claims to be made, where the possibility of a false claims action existed, even though such a claim may have never been pursued or filed. 219 F.2d at 515.

Furthermore, the complaint herein is **not** predicated upon the well documented misconduct of the Defendant in the past as its Motion to Dismiss and the Magistrate erroneously recite. The complaint is predicated upon first person conversations; documents and the firings of key personnel for what Prudential admits is "money laundering" and a confession by Prudential at a company meeting that it had engaged in money laundering and that Ken Brown and other key officials had been fired for money laundering.

The Defendant's claim that this cause should be dismissed because of a 120 day time limit should also be rejected out of hand. The Defendant fails to consider, read or understand the requirement under the False Claims Act that this matter may **not** be served until this Court lifted the seal from the file, in order to allow the six federal agencies, which were served, time to investigate the complaint. Meanwhile, this Court lifted the seal upon the file, but, upon the recommendation of the Magistrate, then improperly dismissed the claim and an appeal was necessary.

Additionally, as noted above the ex parte letter from an Assistant U.S. Attorney referred to in the Defendant's Motion to Dismiss was never an appearance by the United States and contrary to the Defendant and Magistrate's contention has no value as a pronouncement by the United States of anything herein. The Plaintiff served the complaint upon six (6) federal agencies. There are at least two other United States law enforcement agencies, which have proceeded upon the complaint of the Plaintiff and one those proceeded after taking testimony and evidence from the Plaintiff.

In any event, the Plaintiff's complaint is sufficient under the 11th Circuit's opinion in **Fox v. Prudential**, **supra** and the liberal reading standard in **Childree**, **Yesudian** and **Neal**, **supra**.

Furthermore, there exist at least thirty-seven (37) documents, which Prudential has admitted exist as to the Plaintiff's firing, but which Prudential has summarily redacted and refused to produce in other litigation against Prudential, which prove that the firing of the Plaintiff was a pretext for getting rid of the Plaintiff as a whistleblower, who had complained about Prudential's undisclosed past misconduct and its money laundering, which it has studiously concealed. **See, Exhibit A**. The Magistrate has completely overlooked the concealment of these documents by Prudential, which were presented to the Magistrate in the Plaintiff's Response to the Motion to Dismiss.

Finally, in response to the Defendant's improper attempt to prejudice this Court with extensive, incomplete and erroneous recitation of so-called "undisputed facts," the issues involved in the temporary suspension of the law license of the Plaintiff are being investigated by a Florida Bar Commission, which is considering complaints of overzealous and improper conduct by the Lawyer Regulation Division of the Florida Bar. **See**, **Exhibit B**. It is also a subject of litigation in, **Fox v. Florida,** U.S. District Case No. 04-60231-CIV-COHN, another division of this Court. The Plaintiff by resisting an improper subpoena at his own peril has sought to uphold the most sacred principal, which we all swear to as lawyers: the sanctity of attorney client communications. **Id.**

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Plaintiff, CALVIN DAVID FOX, prays that this Court will disqualify itself from any further consideration of this cause; that this Court will reject the Magistrates

Report; and that this Court will deny the Defendant's Motion to Dismiss.

CALVIN DAVID FOX
Florida Bar No. 192098
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Motion to Disqualify and Objection to Magistrate's Report was caused to be served by first class mail on this 31st day of May, 2005 upon Joseph Ianno and Sarah Cortvriend, 222 Lakeview Avenue, suite 1400, West Palm Beach, Florida 33401.

CALVIN DAVID FOX

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY THE COURT

THIS CAUSE comes upon the Plaintiff's Motion to Disqualify the Court **[DE 57]** filed on May 31, 2005. Plaintiff charges this Court with engaging in *ex parte* communications with Defendant, and moves this Court to recuse itself. Specifically, Plaintiff alleges that "this Court and/or its clerks or agents ultimately assisted prudential in defending this cause, by secretly serving and/or notifying Prudential and/or its counsel that it should get into this case and defend this cause." Mot. to Disqualify **[DE 57]**, at 6. Plaintiff claims that he has a "well founded concern . . . that he will not receive fair and impartial treatment" from this Court. *Id.*

28 U.S.C. ¶ 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) also provides that the judge shall also disqualify himself "[w]here he has a personal bias or prejudice concerning a party." The test used to

determine whether recusal is mandated is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1998) (citation and footnote omitted), *cert. denied*, 490 U.S. 1066 (1989). In addition, "for a bias to be personal, and therefore disqualifying, it 'must stem from an extra-judicial source.'" *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 964 (5th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980) (quoting *U.S. v. Grinnel Corp.*, 384 U.S. 563, 583 (1966)). Moreover, "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). The *Grinnell* court explained:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555.

Thus, it is understood that a "high threshold" is required to satisfy the standard for bias and partiality disqualification motions. *In re Lickman*, 284 B.R. 299, 307 (Bankr. M.D. Fla. 2002) (citing *Liteky,* 510 U.S. at 558). A judge should be disqualified "only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." *Id.*

Additionally, "disqualification must be supported by a factual predicate for the alleged bias." *Id.* at 304. In other words, "a judge once having drawn a case should not recuse himself on an unsupported, irrational, or highly tenuous speculation. . ." *In re U.S.,* 666 F.2d 690, 694 (1st Cir. 1981).

Applying these legal standards to this case, the Court cannot conclude that a reasonable, objective, disinterested person with knowledge of the facts would entertain doubts as to the Court's impartiality. The allegations set forth in the motion in support of recusal are insufficient to establish bias, and instead demonstrate only that Plaintiff is dissatisfied by what he perceives to be adverse rulings against him. Accordingly, the Court has considered the motion, the pertinent portions of the record, and it is hereby, ORDERED AND ADJUDGED that the Plaintiff's Motion to Disqualify the Court **[DE 57]** id DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 1st day of July, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Joseph Ianno, Jr., Esq.

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

MOTION REHEARING; RENEWED MOTION TO AMEND; MOTION TO AMEND JUDGMENT

COME NOW, the Plaintiffs, CALVIN DAVID FOX, individually and for THE PEOPLE OF THE UNITED STATES and THE STATE OF FLORIDA, and pursuant to Rules 15, 52b, 59 and 60 Federal

Rules of Civil Procedure and submit this Motion for Rehearing, Renewed Motion to Amend Complaint and Motion to Amend Judgment, to wit:

1.) That at Docket Entry 58, which was filed on **June 3, 2005**, but not served until June 7, 2005, this Court has entered its order Adopting the Report and Recommendation of the Magistrate (DE 56) upon the ground that no timely Objections to the Magistrate's Report were received.

2.) That this Court has overlooked and failed to consider that **timely** Objections to the Magistrates Report were filed at Docket Entry 57 on May 31, 2005 under Rule 6(a) and Rule 6(e) Federal Rules of Civil Procedure.

3.) That the Magistrates Report was served by mail upon the Plaintiff on Thursday, May 12, 2005 and required objections to be served within ten (10) days.

MEMORANDUM

Under Rule 6(a) where the period of time for a response is less than eleven (11) days, intermediate Saturdays Sundays and Holidays are not included in the ten (10) days required for a response. Additionally, under Rule 6(e) since the Magistrates order was served by mail, three (3) additional days for a response is allowed.

In the present case, under Rule 6(a) the days counted towards the due date for the Objections by the Plaintiff (DE 57), would be May 13; 16; 17; 18; 19; 20; 23; 24; 25; 26; and under Rule 6(e) for mailing: 27; 31; and June 1, 1005. Sub judice, the Plaintiff's objections (DE57) were filed on May 31, 2005, which was a day earlier than required under Rule 6(a) and (e).

MOTION TO DISQUALIFY

4.) Furthermore, this Court has overlooked and failed to consider that as a preliminary matter, herein the Court must address the Motion to Disqualify, which is also recited in the Objections to the Magistrates Report (DE57).

5.) It is inappropriate for this Court to proceed upon this matter on any issue without first addressing the Motion to Disqualify the Court from further consideration of this cause.

PENDING ORDER ALLOWING AMENDED COMPLAINT

6.) That this Court has also overlooked and failed to consider that this cause is pending upon an Order, which improperly limited the Plaintiff's right to

Amend the Complaint, inasmuch as the Plaintiff sought to Amend his **entire** complaint, before this Court enabled Prudential to appear and to defend this cause over the Plaintiff's objections.

7.) That the Plaintiff would again seek and request the right to amend his entire complaint as he had first requested and was improperly limited from doing so by the magistrate.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Plaintiff, CALVIN DAVID FOX, prays that this Court will vacate this Court's order Adopting the Magistrates Report and Recommendation and further that this Court will disqualify itself from any further consideration of this cause; and/or that this Court will reject the Magistrates Report; and deny the

Defendant's Motion to Dismiss and or that this Court will instead allow the Plaintiff to submit an Amended Complaint as contemplated and requested in the Plaintiff's Motion to Amend, which was granted in an improper, limited form.

CALVIN DAVID FOX
Florida Bar No. 192098
P.O. Box 7900
Jupiter, Florida 33468-7900
(954) 383-5943

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Motion for Rehearing and to Modify was caused to be served by first class mail on this 13 day of June 2005 upon Joseph Ianno and Sarah Cortvriend, 222 Lakeview Avenue, suite 1400, West Palm Beach, Florida 33401.

CALVIN DAVID FOX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

CASE NO. 03-80081-CIV-RYSKAMP/VITUNAC

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_______________________________________/

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING; RENEWED MOTION TO AMEND; MOTION TO AMEND JUDGMENT

THIS CAUSE comes upon the Plaintiff's Motion for Rehearing; Renewed Motion to Amend; Motion to Amend Judgment **[DE 59]** filed on June 13,

2005. Defendant filed a Response in Opposition **[DE 60]** on June 23, 2005.

I. Motion for Rehearing

First, Plaintiff moves this Court to reconsider its Order Adopting Report and Recommendation **[DE 58]** on the ground that Plaintiff filed "timely" objections thereto. Plaintiff represents that he did not receive a ocpy of the Magistrate's Report and Recommendation **[DE 56]** until May 12, 2005. Plaintiff incorrectly argues that under Fed.R.Civ.P. 6(a), he was allowed until June 1, 2005 to file objections. To the contrary, Plaintiff is not allowed an additional three days *after* a deadline for mailing; rather, the time for filing his objections was May 26, 2005. Additionally, even having considered the Plaintiff's untimely objections

[DE 57], the Court does not find a sufficient basis to reverse its prior decision.

A motion for reconsideration with respect to a judgment shall be construed as a motion to alter or amend a judgment under Fed.R.Civ.P. 59(3) if it is filed no later than ten days after the entry of the judgment; otherwise, it would fall within Rule 60(b), which provides relief from a judgment or order. *See Sussman v. Salem, Saxon and Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994). In the present case, Petitioner's motion was filed within ten days after the entry of judgment and therefore falls within Rule 59(e).

Although Rule 60(b) sets forth particular grounds upon which a party may seek relief, the district court has wide discretion under Rule 59(e) in reconsidering an issue. *See id.* (citing *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982)). In general, reconsideration is justified when one of three grounds exists: (1) there is an intervening change in controlling law; (2) new evidence has become available; (3) there exists a need to correct clear error or prevent manifest injustice. *Id.* Any litigant that moves the court for consideration based upon the third ground "should evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." *SEC v. Seahawk Deep Ocean Tech., Inc.*, 74 F. Supp. 2d 1188, 1192 (M.D. Fla. 1999) (citation omitted).

The moving party "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Sussman*, 153 F.R.D. at 694. A motion for reconsideration should not be used as a vehicle to reiterate arguments previously made or to present issues or cite authorities the party should have presented prior to the court's ruling. *See 7.K. Marine, Inc. v. M/V Archigetis,* 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (quoting *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied,* 476 U.S. 1171 (1986)); *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.,* 169 F.R.D. 680, 686 (M.D. Fla. 1996) (stating that the motion should not be used to rehash arguments previously made and rejected). A party should not use the motion to reconsider to request that the Court rethink "what it already thought through – rightly, or wrongly[.]" *Id.* (citations omitted). "The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Godby v. Electrolux Corp.*, 1994 WL 470220 at *1 (N.D. Ga. 1994) (citation omitted). A motion for reconsideration should be used in order to prevent manifest injustice; nevertheless, it is an extreme measure, and substantial discretion rests with the court in granting such a motion. *E.g.*, *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992).

In this case, Petitioner has failed to present an intervening change in controlling law or new evidence. Nor has Petitioner demonstrated a need to correct clear error or prevent manifest or injustice. Even construing Fed.R.Civ.P. 6(a) broadly to allow Plaintiff's objections to be considered timely, the substance of the objections raised do not support a different result.

II. Motion to Amend

Next, Plaintiff renews his request to amend his Complaint. A review of the record shows that Plaintiff continues to take contrary positions with regard to his desire to amend his Complaint. At the outset of this litigation, Plaintiff filed a two-count complaint against Defendants, alleging a violation of the False Claims Act and conspiracy **[DE 1}**. On March 21, 2003, Plaintiff amended his complaint to add a claim for retaliation **[DE 7]**. The Court dismissed this action without prejudice on November 7, 2003 **[DE 22}**, and the U.S. Court of Appeals for the Eleventh Circuit vacated the Court's order as to the Plaintiff's retaliation claim, and remanded the case for this Court to consider Plaintiff's retaliation claim **[DE 28]**. Thereafter, on November 12, 2004, Plaintiff filed a Motion for Leave to Amend and Serve Amended Complaint **[DE 32}**, seeking leave to amend the complaint "in order to meet the requirements of the 11th Circuit opinion and to provide this Court with additional information and facts . . ." Mot. for Leave to Amend **[DE 32]**, at ¶ 2. The Chief Magistrate Judge granted that motion **[DE 34]**, but Plaintiff failed to file a second amended complaint. Plaintiff then argued that the Eleventh Circuit's opinion did not require Plaintiff to "amend the employment complaint." Mot. to Rehear **[DE 38]**, at ¶ 8. Additionally, Plaintiff contended that the Chief Magistrate Judge erred in granting his Motion to Amend and claimed that he never intended to "amend the employment claim, which the Eleventh

Circuit has found sufficient and has required no amendment." *Id.* at ¶¶ 9-10. He now asks that he be *given* "the *right* to *amend* his entire complaint as he had first requested and was improperly limited from doing so by the magistrate." Mot. for Rehearing **[DE 59]**, at ¶ 7.

The Court cannot allow Plaintiff to continue changing positions on his desire to amend his retaliation claim, and such conduct has already resulted in undue delay. The Court has already advised Plaintiff that his conduct during the course of this litigation in filing successive motions on the same issue, has caused a needless waste of this Court's resources. The Court again reminds Plaintiff of his obligation as a litigant to avoid presenting motions for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Fed.R.Civ.P. 11(b)(1). Any such further conduct may subject Plaintiff to sanctions under Rule 11(c).

THE COURT has considered the Plaintiff's Motion for Rehearing; Renewed Motion to Amend; Motion to Amend Judgment **[DE 59}** and the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the Plaintiff's Motion for Rehearing; Renewed Motion to Amend; Motion to Amend Judgment **[DE 59]** is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 20th day of July, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Joseph Ianno, Jr., Esq.

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 03-80081-CIV-RYSKAMP
Magistrate: Vitunac

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiffs,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
______________________________/

NOTICE OF APPEAL

COME NOW, the Plaintiffs, CALVIN DAVID FOX, individually and for THE PEOPLE OF THE UNITED STATES and THE STATE OF FLORIDA, and hereby take and enter an appeal to the U.S.

Eleventh Circuit Court of Appeal from this Court's Order entitled, "Order Adopting Report and Recommendation," which was filed on June 3, 2005 and served on the Plaintiffs on June 7, 2005, which was rendered final by the Order of the Court, entitled, "ORDER DENYING PLAINTIFFS' MOTION FOR REHEARING; RENEWED MOTION TO AMEND; MOTION TO AMEND JUDGMENT," filed on July 20, 2005. The nature of the order appealed from is a final order, which rejects the Plaintiff's Objections to the Magistrate's Report and the Plaintiff's Motion to Disqualify the Court and adopts the Magistrate's report and dismissing this cause.

RESPECTFULLY SUBMITTED, on this 17th Day of August 2005 at Fort Lauderdale, Broward County, Florida.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468
(954) 383-5943

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the foregoing Notice of Appeal, was caused to be served on this 17th day of August, 2005 upon Joseph Ianno and Sarah Cortvriend, 222 Lakeview Avenue, Suite 1400, West Palm Beach, Florida 33401.

CALVIN DAVID FOX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

CASE NO. 03-80081-CIV-RYSKAMP/VITUNAC

CALVIN DAVID FOX for himself and
THE PEOPLE OF THE UNITED STATES;
and THE STATE OF FLORIDA,
Plaintiff,

vs.

PRUDENTIAL FINANCIAL, d/b/a,
PRUDENTIAL SECURITIES, formerly
known as PRUDENTIAL INSURANCE
or PRUCO; and the NEW YORK STOCK
EXCHANGE.
Defendants.
_____________________________________/

ORDER CLOSING CASE

THIS CAUSE comes before the Court *sua sponte.* On June 3, 2005, this Court dismissed Plaintiff's Amended Complaint **[DE 7]** without prejudice. *See* Ord. Adopting Report & Rec. **[DE 58]**. Plaintiff did not file a Second Amended Complaint.

The Court thereafter denied Plaintiff's Motion for rehearing **[DE 62]**, and the Plaintiff filed a Notice of Appeal **[DE 63]**. Based on the current status of this case, it is hereby,

ORDERED AND ADJUDGED that this case is hereby CLOSED. The Clerk of the Court shall CLOSE this case for administrative purposes and DENY all pending motions as MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 29th day of August, 2005.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to:
Chief Magistrate Judge Vitunac
Calvin David Fox, *pro se*
Joseph Ianno, Jr., Esq.